

Appeal from a Decision of the Nevada State Office, Bureau of Land Management, declaring mining claims and mill sites abandoned and void. NMC 115516, NMC 115517, NMC 115526, NMC 177155, and NMC 191094.

Affirmed in part, affirmed as modified in part, set aside and remanded in part, and reversed in part.

1. Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees: Generally--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

Under section 314 of FLPMA, 43 U.S.C. § 1744 (1994), the owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the mining claim on or prior to Dec. 31 of each year. Failure to file within the prescribed period results in the claim being deemed abandoned and void. A miner who was granted an exemption from the rental fee requirements of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 in lieu of the assessment work requirements contained in the Mining Law of 1872 and the filing requirements contained in section 314(a) and (c) of FLPMA remained responsible for complying with those assessment work requirements. Any mining claim for which a claimant was granted an exemption from the rental fee is properly declared abandoned and void in the absence of such compliance.

2. Mill sites: Generally--Mining Claims: Abandonment--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold--Mining Claims: Rental or Claim Maintenance Fees: Generally--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

A mining claimant who files a satisfactory certificate of exemption from payment of rental fees is required to file evidence of assessment work performed within the

time period prescribed in the Act of Oct. 5, 1992, and failure to do so results in a conclusive presumption of abandonment of the mining claim. However, the failure of the owner of a mill site to file an annual notice of intention to hold the mill site is a curable defect and before BLM declares a mill site abandoned and void for failure to make such a filing, it must provide the owner notice and an opportunity to cure the defect.

3. Mill sites: Generally--Mining Claims: Abandonment--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold--Mining Claims: Rental or Claim Maintenance Fees: Generally--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

Failing to identify a mill site as being covered by an exemption certification until after the Aug. 31, 1993, deadline established by 43 C.F.R. § 3833.1-7(a), amounts to a failure to timely request such certification.

John C. Schandelmeier, 138 IBLA 36 (1997), overruled to the extent inconsistent.

APPEARANCES: Kathryn Firestone, Searchlight, Nevada, pro se.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Kathryn Firestone (appellant) has appealed from the September 1, 1994, Decision of the Nevada State Office, Bureau of Land Management (BLM), declaring the Kay-E placer mining claim (NMC 115516), the Jolly Job (NMC 115517) and El Dorado (NMC 191094) lode mining claims, and the Kay-E (NMC 115526) and Jolly Job (NMC 177155) mill site claims abandoned and void for failure to file required affidavits of assessment work performed during the 1993 assessment year. We stayed BLM's Decision by order dated December 1, 1994.

On August 31, 1993, appellant filed a single Certification of Exemption from Payment of Rental Fee form (OMB No. 1004-0114)(certification form) listing and identifying by serial number the Kay-E Mine placer claim and the Kay-E mill site claim. The space for indicating the assessment year for which the form was filed was blank, as was the space for identifying the notice or plan of operations pertaining to the claims.

On February 14, 1994, BLM advised appellant and her co-claimants as follows:

We received your exemption from payment of rental fee forms [sic] in our office on August 31, 1993. No filing dates for "assessment years" were indicated, for instance, September 1, 1992 – September 1, 1993 for assessment year 1993 and September 1, 1993 – September 1, 1994 for assessment year 1994. Please see instruction number 2, a separate certificate

must be filed for each assessment year. If you intended this filing for both years please fill out individual forms for each year and return to us within 30 days of receipt of this letter. Failure to respond will cause a decision to be issued which will declare your claims abandoned and void (43 CFR 3833.4(b)).

A blank copy with highlighted areas is enclosed, these are the important points to be covered. In reference to instruction No. 10, we need originally signed, notarized copies of your exemption forms and pursuant to [43 CFR] 3833.1-6(a)(4), the mining claims for which an exemption is claimed requires a Notice, Plan of Operation or Special use Permit number, issued by a Federal or State Agency. Please be sure to include these numbers on the forms you return to us.

Thus, BLM correctly treated these omissions as curable defects. 1/

On March 7, 1994, within the 30 days allowed for compliance, appellant submitted two completed certification forms, one for the 1992-93 assessment year, and one for the 1993-94 assessment year. However, instead of two claims, as set out in the certification form filed on August 31, 1993, each form now listed five claims: the Kay-E Mine placer claim (NMC 115516) and the Kay-E mill site claim (NMC 115526) (the two claims that had been listed previously in the form filed on August 31, 1993), as well as the Jolly Job (NMC 115517) and El Dorado (NMC 191094) lode mining claims and the Jolly Job (NMC 177155) mill site claim.

The record contains nothing further until BLM's September 1, 1994, Decision declaring all five claims abandoned and void for failure to file "affidavit[s] of assessment work performed for the period of September 1, 1992, through September 1, 1993," on or before December 30, 1993.

In her statement of reasons, Firestone explains that she and her husband held these claims for 30 years without incident, but since his passing away she has attempted to file the necessary paperwork. Firestone states that she was "caught up in the Rental Fee [requirements] and tried going Exempt as a Small Miner." She contends she filed a notice of intent to hold which she "thought was in lieu of the rental fee and the Assessment Affidavit." Appellant argues that she is definitely working these claims and therefore the stated purpose of the rental fee to discourage "frivolous claims" should not apply.

1/ Although separate waiver forms were required to be submitted for the 1993 and 1994 assessment years (43 C.F.R. § 3833.1-7(d) (1993)), the timely submission of a single form is curable under 43 C.F.R. § 3833.4(b) (1993), if the claimant is able to show that she unintentionally failed to indicate on the form which years would be exempted. Thelma C. Satrom, 138 IBLA 180 (1997). Further, the failure to specify the number of a notice, plan, or permit is also curable. Leber Mining Co., 131 IBLA 275 (1994).

[1] Under section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1994), the owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the mining claim prior to December 31 of each year. Failure to file within the prescribed period results in the claim being deemed abandoned and void. United States v. Locke, 471 U.S. 84 (1985).

On October 5, 1992, Congress enacted the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Appropriations Act), Pub. L. No. 102-381, 106 Stat. 1374, 1378-79 (1992), a provision of which required each claimant to "pay a claim rental fee of \$100 to the Secretary of the Interior or his designee on or before August 31, 1993," for each unpatented mining claim, mill or tunnel site, in order to hold such claim for the assessment year ending at noon on September 1, 1993. The Appropriations Act also contained an identical provision establishing rental fees for the assessment year ending at noon on September 1, 1994, requiring payment of an additional \$100 rental fee on or before August 31, 1993. 106 Stat. 1378-79. These requirements were imposed "in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28-28e), and the filing requirements contained in section 314 (a) and (c) of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744 (a) and (c))." Congress further mandated that "failure to make the annual payment of the claim rental fee as required by this Act shall conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant * * *." 106 Stat. 1379; see also 43 C.F.R. § 3833.4(a)(2) (1993).

However, Congress provided an exemption from this rental fee requirement, the so-called "small miner exemption," that was available to claimants holding 10 or fewer claims on Federal lands who met all the conditions set forth in 43 C.F.R. § 3833.1-6(a) (1993). Washburn Mining Co., 133 IBLA 294, 296 (1995). Congress left no doubt that a miner who gained an exemption from the rental fee requirements remained responsible for complying with the assessment work requirements of the Mining Law of 1872 and FLPMA. The Appropriations Act specifically provided that

each claimant [qualifying as a small miner] may elect to either pay the claim rental fee * * * or in lieu thereof do assessment work required by the Mining Law of 1872 * * * and meet the filing requirements of FLPMA * * * on such ten or fewer claims and certify the performance of such assessment work to the Secretary.

(Emphasis added.)

It is thus clear that, even though appellant gained an exemption for the Kay-E mining claim, she was required by the Appropriations Act to comply with the recordation requirements of FLPMA by filing copies of her proofs of annual assessment work for her claims with BLM on or before December 30, 1993. 43 C.F.R. § 3833.1-7(b)(1) (1993). In absence of this filing, any mining claim for which Firestone was granted an exemption from the rental fee is properly declared abandoned and void. 43 C.F.R. § 3833.4(a)(1) (1993); Dale J. LaCrone, 135 IBLA 203, 205-06

(1996); Lee Jesse Peterson, 133 IBLA 381, 384 (1995). There is no record of assessment work affidavits in this case, and Firestone does not state that she filed any. Even assuming *arguendo* that the belated filing of an amended certification for the Jolly Job and El Dorado mining claims could be seen as authorizing an exemption for those claims, all of the mining claims at issue here (the Jolly Job, El Dorado, and Kay-E claims) were properly declared abandoned and void for failure to meet the annual filing requirements of FLPMA. Daniel D. Koby, 139 IBLA 131 (1997). 2/

[2] Nevertheless, we must set aside BLM's Decision concerning the Kay-E mill site. Assessment work is not required for a mill site, and in Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981), we held that, under section 314 of FLPMA, 43 U.S.C. § 1744 (1994), failure to make the annual filing of notices of intention to hold mill sites and tunnel sites is a curable defect. 3/ See also Libra Mining and Mineral Corp., 128 IBLA 84 (1993). Although a claimant seeking a small miner exemption for a mill site claim may still be required by 43 C.F.R. § 3833.2-2 to file a notice of intention to hold the mill site, the failure to file the annual notice is a curable defect. Before BLM declares a mill site abandoned and void for failure to make such a filing, it must provide the owner notice and an opportunity to cure the defect. BLM's September 1, 1994, Decision did not provide that opportunity, and the case must therefore be remanded for BLM to take appropriate action. 4/

[3] We do not reach a similar conclusion for the Jolly Job mill site, as we hold that no valid certification of exemption was timely filed for it. It is self-evident that not every omission can properly be treated as "curable" under 43 C.F.R. § 3833.4(b) (1993). The omission of a date or dates from an exemption form can be shown to be an unintentional failure to file the complete information required in 43 C.F.R. § 3833.1-7(d) and (e).

See Thelma Satrom, *supra*. However, the very identity of the claim or claims for which exemption is sought, being at the heart of the certification process, is not such an omission. The regulations support the principle that a claimant must, at a minimum, identify the claims for which

2/ Assuming that no proper certification was timely filed for the Jolly Job and El Dorado mining claims (a treatment consistent with that adopted herein for the Jolly Job mill site), the consequences of appellant's failure to timely pay the \$100 rental required by the Appropriations Act are the same: the claims were properly declared abandoned and void. The Department is without authority to excuse lack of compliance with the rental fee requirement, to extend the time for compliance, or to afford any relief from the statutory consequences. Lester W. Pullen, 131 IBLA 271, 273 (1994); William B. Wray, 129 IBLA 173, 175 (1994); Lee H. and Goldie E. Rice, 128 IBLA 137, 141 (1994).

3/ Although some BLM offices have held that mill and tunnel sites are not eligible for the exemption, the Board rejected this holding in Jack J. Swain, Sr., 142 IBLA 122, 128-29 (1998).

4/ We note that if the Kay-E mill site is a dependent mill site, its validity may be affected by the abandonment of the Kay-E placer mining claim. See generally United States v. LeFaivre, 138 IBLA 289 (1997).

exemption is being sought. The regulation naming "curable" defects, 43 C.F.R. § 3833.4(b) (1993), referred only to unintentional failure to file the complete information required by 43 C.F.R. § 3833.1-7(d) (1993) (among other filing requirements concerning mining claims). A failure to meet requirements set out in other subsections is not curable. Thus, although the requirement that "separate statements" be filed (see BLM Information Memorandum No. 93-514 (Aug. 2, 1993)) and that the period of the requested exemption be completed (see Thelma Satrom, supra) have been adjudged curable, the timely filing of a certification, required by 43 C.F.R. § 3833.1-7(a), is not. We hold that failing to identify the Jolly Job mill site as being covered by the exemption certification until after the August 31, 1993, deadline established by 43 C.F.R. § 3833.1-7(a), amounts to a failure to timely file a certification for that mill site. Failure either to file a timely certification of exemption for a mill site or pay the \$100 rental fee required by the Appropriations Act properly results in the mill site being declared abandoned and void.

Although BLM declared the Jolly Job mill site abandoned and void because appellant had failed to file an affidavit of assessment work before December 31, 1993, as discussed above, that holding was not proper for a mill site. However, the Jolly Job mill site had already become abandoned and void after August 31 for failure to pay the \$100 rental fee.

Accordingly, BLM's Decision with respect to this mill site is affirmed as modified.

Judge Harris cites John C. Schandelmeier, 138 IBLA 36 (1997), for the proposition that "the filing of a single certification could be considered a curable defect only if the single certification listed both assessment years." That case concerned a different factual situation than that presented in the instant case, where BLM received one certification form listing a single assessment year (1993). Upon cancellation of his claims for failure to pay the assessments for 1994, the filer asserted that he had in fact filed two separate certificates (one for each year). He also argued that, even if he had only filed one certificate, he intended it to cover 2 assessment years (both 1993 and 1994). Id. at 39. We concluded that he had failed to establish that he had filed two forms and that, since the single form BLM did receive "failed to indicate that it was intended to cover 2 years, the failure to submit separate statements [was] not a curable defect." Id. at 39. 5/

There is no dispute that filing a certification listing a single assessment year is not a "curable defect." The regulation establishing the opportunity to cure certain defects in filing, 43 C.F.R. § 3833.4(b), covers "[u]nintentional failure to file the complete information required in" 43 C.F.R. § 3833.1-7(d) (among other provisions requiring the filing of information concerning mining claims). Filing of a certification form with the space provided on the form for "assessment year" filled in with

5/ Thus, the opinion does not state that filing a single certification could be considered a curable defect only if the single certification listed both assessment years.

"1993" is not a situation where a party has failed to file complete information, but one where assertedly incorrect information was filed. The circumstances described by filing a certification form specifying only 1 year are plausible and clear from the face of the document: the filer is seeking an exemption only for the 1 assessment year specified. If that entry is incorrect, the filer must accept the consequences of that mistake.

The facts in the present case (and in our decision in Thelma Satrom, *supra*, the dissenters' principal target) are different. Satrom and Firestone both filed certification forms where the space for the assessment year was left blank. BLM concluded in the present case and we ruled in Satrom that leaving the form blank fell within the coverage of 43 C.F.R. § 3833.4(b), that is, that it was an "[u]nintentional failure to file the complete information required." 6/

The situation in Schandelmeier involved supplying incorrect information, not failure to file complete information. Therefore, the Board in Schandelmeier did not have before it and accordingly did not address whether other circumstances might fall under 43 C.F.R. § 3833.4(b).

To the extent that Schandelmeier can be read as stating that the filing of a single certification could be considered a curable defect *only* if the single certification listed both assessment years, it plainly went beyond the scope of what it was necessary to consider in deciding that case. To the extent that the "rule established by Schandelmeier" (as it is described by Judge Harris) went beyond the scope of the facts in that case, it is dictum, and we are not bound to follow it. 7/

The dissenters provide no reason for us to alter the policy set out in Satrom providing that, under 43 C.F.R. § 3833.4(b), a failure to file

6/ BLM did not initially reach that conclusion in Thelma Satrom. We would note, however, that BLM's Decision in the instant case was made prior to our decision in Satrom and was therefore not influenced by that decision.

7/ Appellant Johnson argued in Schandelmeier that he had in fact filed two separate forms (one each for the 1992-93 and the 1993-94 assessment years) and that BLM had misplaced one of them. John C. Schandelmeier, 138 IBLA at 39. Despite suggestions to the contrary in the dissents, Johnson did not argue that he had unintentionally failed to specify 2 years on a single form. He argued that, even though BLM had not received one of the two documents he had filed, he should still prevail because filing a single certification form mentioning a single filing year was a curable defect where the claimant must have intended to file for both years. *Id.* That argument was properly rejected by the Board, and nothing in either Satrom or the instant decision (which concern filing of forms not mentioning any assessment year) holds otherwise.

In any event, to the extent that Schandelmeier can be read as ruling that the filing of a single certification could be considered a curable defect *only* if the single certification listed both assessment years, it was superseded, although not expressly overruled, by the Board's subsequent opinion in Thelma Satrom, 138 IBLA 180 (1997). To the extent that Schandelmeier is inconsistent with Satrom and the instant decision, it is now expressly overruled.

a complete certification form is curable, provided that the failure was unintentional. BLM obviously concluded that Firestone's failure to file was unintentional, and we find no basis to disturb that conclusion. ^{8/} Furthermore, BLM has adopted a policy of accepting as timely filed a single form seeking an exemption for the 2 assessment years of 1993 and 1994. Thus, Firestone was properly given the opportunity to cure her failure to file a complete form and did so by filing two complete forms for both the 1993 and 1994 assessment years.

Judge Harris opines that when an exemption certification is filed without listing any assessment year, that claimant should be in no better position than the claimant who only lists 1 assessment year on the certification. However, his position is not consistent with the regulatory scheme allowing a claimant to cure unintentional failure to file complete information. Listing of 1 assessment year results in a facially complete form which, we have held in Schandelmeier, binds the filer. A form containing a blank space for the assessment year, we have held in Satrom, cannot be seen as complete and may be an "unintentional failure to file the complete information required in 43 C.F.R. § 3833.1-7(d)" under 43 C.F.R. § 3833.4(b).

Judge Burski would hold that the incompleteness of Firestone's filing rendered her certification "totally void" under 43 C.F.R. § 3833.1-7(b). He correctly points out that the curable-defect provisions of 43 C.F.R. § 3833.4(b) do not cover the annual filing requirements of 43 C.F.R. § 3833.1-7(b). However, there is no dispute here that Firestone timely filed a certification that (at least as to the claims identified therein by name and serial number) met the requirements of 43 C.F.R. § 3833.1-7(b).

Thus, by timely filing her certification identifying certain claims, she met the requirements of that section as to the identified claims.

The majority concludes that a timely filed certification identifying claims for which the exemption is being sought is an integral part of the requirements of 43 C.F.R. § 3833.1-7(b). As a result, we hold herein as to claims which Firestone failed to identify in her timely-filed certification of exemption, that there can be no cure, as the provisions of 43 C.F.R. § 3833.1-7(b) were not met as to those claims. We are aware that we are making a distinction that the dissenters do not agree with. However, recognizing that 43 C.F.R. § 3833.4(b) must apply to something

^{8/} Judge Harris now attacks our conclusion in Satrom that her failure to fill in the assessment year blank on the form was unintentional. Although it is true that Satrom never expressly stated that her failure to include both years was unintentional, it takes no great leap to arrive at that conclusion based on her statements. Thus, her statement indicates that, since her failure to include "certain information" (presumably the missing information in the date block) was unintentional; that, since BLM had adopted a policy that inclusion of 2 years in the date block would be acceptable (thus rendering her failure to file separate forms inconsequential); and, that (presumably) she had intended to seek an exemption for 2 years, her failure to fill in that block was not disqualifying.

if it is to have any meaning at all, we choose to draw the line between mandatory filing and curable defect here, where the claimant has timely filed a certification of exemption naming some claims but leaving a portion of the certification incomplete, rendering it impossible to judge whether the exemption should be granted. The regulatory history cited by Judge Burski suggests that the provisions of 43 C.F.R. § 3833.4(b) were intended to allow any "errors found in the submission" to be cured. Obviously, we have not embraced such a broad view. However, the dictum in Schandelmeier notwithstanding, it remains in our power to draw the line where we did in Satrom and to apply that distinction in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed with respect to the Kay-E placer mining claim (NMC 115516), the Jolly Job (NMC 115517) and El Dorado (NMC 191094) lode mining claims; affirmed as modified with respect to the Jolly Job mill site (NMC 177155); and set aside and remanded with respect to the Kay-E mill site (NMC 115526).

David L. Hughes
Administrative Judge

We concur:

James L. Byrnes
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

Will A. Irwin
Administrative Judge

R.W. Mullen
Administrative Judge

James P. Terry
Administrative Judge

ADMINISTRATIVE JUDGE HARRIS DISSENTING:

In order to save an indefensible decision of this Board, Thelma Satrom, 138 IBLA 180 (1997), which is inconsistent with John C. Schandelmeier, 138 IBLA 38 (1997), a case cited numerous times by this Board, the majority has constructed a logically inconsistent result in this case. Although the issue presented arises under the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (the Act), Pub. L. No. 102-381, 106 Stat. 1374, 1378-79 (1992), and, therefore, should not be reoccurring, arguably the result reached by the majority would require the Bureau of Land Management (BLM) to review all its prior rental fee adjudications to determine if it deemed claims or sites abandoned and void without allowing the claimant the opportunity to cure in circumstances such as those discussed in this case.

For the reasons stated below, I would overrule Satrom and affirm the decision of the Nevada State Office, BLM, as modified.

In its September 1, 1994, decision, BLM declared three mining claims (NMC 115516, NMC 115517, NMC 191094) and two mill sites (NMC 115526 and NMC 177155) owned by Kathryn Firestone abandoned and void for failure to file required affidavits of assessment work performed during the 1993 assessment year.

The case record shows that on August 31, 1993, appellant filed a single certification of exemption from payment of rental fees required by the Act, an exemption available to claimants holding 10 or fewer claims or sites on Federal lands who met all the conditions set forth in 43 C.F.R. § 3833.1-6(a). The regulations required that a claimant apply for the small miner exemption by filing separate certifications of exemption on or before August 31, 1993, supporting the claimed exemption for each assessment year claimed. 43 C.F.R. § 3833.1-7(d) (1993); Richard L. Shreves, 132 IBLA 138, 140 (1995); Edwin L. Evans, 132 IBLA 103, 105 (1995). No grace period for filing late certifications of exemption was provided by Departmental regulation; those documents must have been received by BLM on or before the date required by regulation. See 43 C.F.R. § 3833.0-5(m) (1993); Nannie Edwards, 130 IBLA 59, 60 (1994).

The single certificate filed by Firestone listed only one mining claim, NMC 115516, and one mill site, NMC 115526. The space for indicating the assessment year to which the form applied was blank, as was the space for identifying the relevant notice or plan of operations pertaining to the claims. Accompanying that certification was a notice of intention to hold the claim and mill site. BLM treated the omissions on that single certification as curable defects and issued a letter dated February 14, 1994, that required appellant to submit separate exemption forms for each year and identify the notice, plan, or permit under which the claim and mill site were being operated.

I believe that BLM erred in considering the omission of any date on the single certification filed in this case to be a curable defect.

In John C. Schandelmeier, 138 IBLA 36, 39 (1997), a case in which we affirmed a BLM decision declaring mining claims abandoned and void for failure to pay rental fees or submit appropriate certification for a small miner exemption, we held that, despite the requirement for the filing of separate small miner exemption forms for the 1993 and 1994 assessment years, the timely submission of a single form would be a curable defect, if the form itself indicated that it was being filed to cover both years. In Schandelmeier, a claimant filed a single form for the 1993 assessment year. The claimant did not indicate on that form that he intended that it cover both assessment years. Nevertheless, he argued that his failure to do so was a curable defect, citing question and answer C.4 in BLM Information Bulletin No. 93-514 (August 2, 1993). That question and answer read:

If I am filing for an exemption for assessment years 1993 and 1994, must I file two forms or can both years be included on one form?

Answer: The regulations require a separate exemption form to be filed for each year an exemption is claimed. This is to avoid confusion over which assessment year is being claimed. However, if one form is submitted by a claimant who holds claims located prior to October 5, 1992, and the claimant must have intended to file an exemption for two years, it is considered a curable defect.

As we pointed out in Schandelmeier, the question in the Bulletin presupposed that both years had been listed on the single form submitted. In that circumstance, BLM would consider the single form filed for 2 years to be a curable defect, and the claimant would be allowed to submit separate forms for each year to comply with the regulation. In Schandelmeier, the form indicated that it was filed only for 1993. Because the form itself failed to indicate that it was intended to cover 2 years, we held that the failure to submit a separate form for the 1994 assessment year was not a curable defect.

Thus, the rule established by Schandelmeier was that the filing of a single certification could be considered a curable defect only if the single certification filed listed both assessment years. While the majority characterizes the Schandelmeier rule as "dictum," asserting that it went "beyond the facts in that case," that rule, which appears in a headnote in Schandelmeier, is not dictum. The Board developed it in direct response to an argument by one of the Schandelmeier claimants that, if a single certificate were filed, it was intended to cover both assessment years, and as such, it was a curable defect.

Less than 1 month following the issuance of Schandelmeier, the Board released the Satrom decision, which took a different approach, one which should be overruled. In Satrom, BLM issued a decision declaring a mining

claim abandoned and void because the claimants had failed to pay rental fees timely and the exemption certification that had been filed with BLM did not list any assessment year.

Examination of the waiver certification filed in Satrom shows that it was deficient for two reasons. The claimants failed to include thereon the serial number or other designation for the Notice, Plan of Operations, Special Use Permit, or other State or local permit under which the claim was being operated, and they also did not list any assessment year on the certification. In an affidavit filed on appeal by Thelma Satrom, she stated generally that the failure to include "certain information" on the certification was unintentional. She specifically stated therein that "I was advised by my attorney that the Department of [the] Interior has stated it would accept a Certification of Exemption wherein two (2) years were included in the date blocks, specifically 'September 1, 1992 and ending at noon September 1, 1994.'" 1/

In issuing our decision in Satrom, we relied on Thelma Satrom's general statement and the language of 43 C.F.R. § 3833.4(b) (1993) to conclude that BLM should have provided claimants with the notice called for by the regulation before declaring the claim abandoned and void.

The regulation relied on in Satrom reads as follows:

(b) Unintentional failure to file the complete information required in * * * [43 C.F.R. §] 3833.1-7(d) * * * when the document is otherwise filed on time, shall not be deemed conclusively to constitute an abandonment of the claim or site, but such information shall be filed within 30 days of receipt of a notice from the authorized officer calling for such information. Failure to file the information requested by the decision of the authorized officer shall result in the mining claim * * * being deemed conclusively to be abandoned and it shall be void.

43 C.F.R. § 3833.4(b) (1993). We also stated in Satrom, after quoting the same question and answer from Information Bulletin No. 93-514 cited in Schandelmeier, that "[t]here is no doubt here that appellant 'must have intended to file an exemption for 2 years': she has filed an affidavit so stating. BLM should have treated the defect as curable." 138 IBLA at 181, n.2.

However, Satrom's affidavit did not expressly state that she intended to file separate certifications or that she even intended to file an

1/ Satrom's attorney stated in the notice of appeal that "we have been advised that the Department will accept a single Certificate of Exemption where the claimant put a two (2) year period in the date section."

exemption for 2 years. Instead, her specific statement was that her attorney had been informed that a certification of exemption listing both assessment years would be acceptable. Thus, her attorney's understanding was consistent with the approach that we took in Schandelmeier that a single certification would be acceptable if it listed both assessment years. As we stated in Schandelmeier, the filing of such a certification containing both assessment years on a single certification could be considered a curable defect. Logically, the filing of a certification without listing any assessment year could not.

What was overlooked in Satrom was that the evidence of intent must have been observable from the face of the single certification that was filed. Then, and only then, could BLM apply 43 C.F.R. § 3833.4(b) (1993) to allow the claimant to file separate certifications to cure the deficiency. When an exemption certification was filed without listing any assessment year, that claimant should be in no better position than the claimant who only listed 1 assessment year on the certification. We have stated many times, both before and after the issuance of Schandelmeier, that the filing of a single certificate listing only 1 assessment year does not comply with the Act and regulations. Janet Cochran, 140 IBLA 390, 392 (1997); Lookout Mountain Mining & Milling Co., 140 IBLA 17, 20-21 (1997); James A. Becker, 138 IBLA 347, 349 (1997); Robert C. Bishop, 138 IBLA 166, 169 (1997); James L. Patterson, 137 IBLA 156, 158 (1996); Richard L. Shreves, 132 IBLA 138, 140 (1995); Edwin L. Evans, 132 IBLA 103, 106 n.3 (1995).

If failure to list a 2nd year on the certification does not comply with the Act and regulations, it is difficult to understand how, logically, failure to list both years could constitute compliance. The majority distinguishes the single year filing from the certification containing no assessment year by reasoning that the former is a "facially complete" certification, which the claimant is not entitled to cure, while the latter is an "incomplete" certification, which may be cured under 43 C.F.R. § 3833.4(b) (1993). However, as Judge Burski explains in his separate dissent, a certification form without an assessment year is not an incomplete certification, it is not a certification at all.

The record shows that appellant failed to pay the required rental fees or file the necessary certifications of exemption on or before August 31, 1993. Accordingly, appellant's three mining claims and two mill sites are properly deemed abandoned and void. The Department is without authority to excuse lack of compliance with the rental fee requirement, to extend the time for compliance, or to afford any relief from the statutory consequences. Lester W. Pullen, 131 IBLA 271, 273 (1994); William B. Wray, 129 IBLA 173, 175 (1994); Lee H. and Goldie E. Rice, 128 IBLA 137, 141 (1994). Although BLM declared the claims and mill sites abandoned and void because appellant failed to file affidavits of assessment work on or before December 30, 1993, they became abandoned and void after August 31, 1993, when no rental fees or exemption certifications were filed for them.

Accordingly, I would affirm BLM's decision on this modified basis and overrule the Satrom decision.

Bruce R. Harris
Deputy Chief Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

John H. Kelly
Administrative Judge

T. Britt Price
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI DISSENTING:

While in full agreement with the views expressed by Deputy Chief Administrative Judge Harris in his dissenting opinion, I wish to write separately both to emphasize my profound disagreement with the majority decision herein and to explore in greater detail the majority's basic disregard for the regulatory provisions and Departmental precedents which it is ostensibly applying.

At the outset, it is important to note that the majority conclusion that failure to enter any year on the certification form is a curable defect flows not from any neutral analysis of the regulations. Rather, the regulations are given a cramped and tortured meaning for the sole purpose of justifying a result which the majority desires to reach. Then, having essentially concocted its own exception to the regulations, the majority decision fashions two additional adjudicatory rules out of whole cloth: one, the "heart of the certification process" rule, for the obvious purpose of limiting the applicability of the majority's analysis to the facts at hand; and, second, the "facially complete" rule, to somehow fit the majority's holding within the prior decisional framework of the Board.

Just as is true with its main holding, neither of these rules has any basis in the law, regulations, or decisional precedents of the Department.

The majority, of course, relies on the fact that the panel decision in Thelma C. Satrom, 138 IBLA 180 (1997), reached the same result as that espoused by the majority. But other than the fact that the Satrom decision did, indeed, permit a claimant to cure a defective certification, the Satrom decision affords scant intellectual support for any proposition.

Given the total absence of any legal analysis in the Satrom decision, 1/ the majority herein is required to construct a post facto rationale to justify its desired result. Unfortunately, despite all of its efforts, the end result does not withstand scrutiny.

The majority opinion first allows recourse to 43 C.F.R. § 3833.4(b) to justify transformation of a submission from appellant which, in reality, certifies nothing into a certification of exemption; then invokes § 3833.4(b) a second time to make this "certification" into one which covers 2 consecutive years and thereby establish compliance with 43 C.F.R. § 3833.1-7(b)(1) and (2); and finally invokes § 3833.4(b) a third time to allow appellant to cure her failure to file two "separate" certifications as required by 43 C.F.R. § 3833.1-7(d). But then, having turned 43 C.F.R. § 3833.4(b) into a veritable Philosopher's stone, the majority suddenly

1/ The dissenting opinion of Judge Harris clearly establishes the strained construction which the Satrom panel applied both to the subsisting facts and the arguments raised therein. Indeed, while the Satrom panel quoted the language of 43 C.F.R. § 3833.4(b), it neither cited nor discussed the language of 43 C.F.R. § 3833.4(a)(2) upon which the BLM decision had expressly relied. See discussion infra.

blanches at allowing appellant to cure another "unintentional failure to file complete information" when it rejects her attempt to add an additional three claims to her "certification." This last amendment is disallowed on the ground that, since "the very identity of the claim or claims for which exemption is sought [is] at the heart of the certification process," the omission of a claim name cannot be subsequently cured. Supra at 130. In fact, however, as explained below, even if there were some basis for the "heart of the certification process" rule devised by the majority, which there is not, the year for which an exemption is sought is as much "at the heart of the certification process" as either the name of the claim or the identity of the claimants submitting the certification.

Notwithstanding the majority's assertions, the regulatory structure lends no support to the ungainly edifice which the majority erects. Indeed, the result which the majority seeks to foster is directly contrary to both the regulatory language and the history of the regulation and constitutes nothing more than an unvarnished effort by the majority to rewrite the regulation to its choosing.

The starting point of any analysis is 43 C.F.R. § 3833.1-7(d). That regulation initially provides that "[t]he small miner shall file a separate statement on or before August 31, 1993, supporting the claimed exemption for each assessment year a small miner exemption is claimed." (Emphasis supplied.) Having established the requirement of filing separate statements for each year a small miner exemption was claimed, the regulation then goes on, in great detail, to describe what the certification is required to contain. Among the many requirements is a declaration that the gross dollar revenues fit within the statutory requirements for each assessment year for which an exemption was claimed (§ 3833.1-7(d)(4)(i) and (ii)), a declaration that the required assessment work has been (for the 1993 assessment year) or will be (for the 1994 assessment year) performed (§ 3833.1-7(d)(5)(i) and (ii)), a requirement that all owners sign the certification (§ 3833.1-7(d)(7)), and a requirement that the certification be notarized (§ 3833.1-7(d)(8)).

It is important to note, however, that the requirement that certifications of exemption be filed for each year for which they are sought is independently replicated in 43 C.F.R. § 3833.1-7(b)(1) and (2). Thus, subsection (b)(1) provides, inter alia, that "[f]or the assessment year beginning September 1, 1992, * * * [t]he certified statement required by paragraph (d) of this section shall be filed in the proper State Office of the BLM on or before August 31, 1993, and shall contain all of the information required in paragraph (d) of this section." Subsection (b)(2) similarly provides that "[f]or the assessment year beginning September 1, 1993, * * * [t]he certified statement required by paragraph (d) of this section shall be filed on or before August 31, 1993, and shall contain all of the information required in paragraph (d) of this section." What is of considerable significance, for reasons explained below, is that subsection (b), unlike subsection (d), does not explicitly mandate the filing of separate certifications, though it does require the filing of a certification for each year.

Absent other regulatory language, failure to comply with the provisions of either subsection (b) or subsection (d) might be seen as invalidating a claim. However, in an apparent attempt to ameliorate, in some slight way, the harshness of the consequences attendant upon a failure of compliance, the Department, in 43 C.F.R. § 3833.4(b), provided that, under certain circumstances, the "unintentional failure to file the complete information" would be a curable defect. This, of course, is the provision cited by the panel in Satrom and relied upon by the majority herein. Unfortunately for both the Satrom panel and the majority in this case, 43 C.F.R. § 3833.4(b), by its express terms, simply does not apply to a failure to file a certification for each year.

Thus, 43 C.F.R. § 3833.4(b) provides:

Unintentional failure to file the complete information required in §§ 3833.1-2(b), 3833.1-7(d) and (e), 3833.2-4(a), 3833.2-4(b), 3833.2-5(c), and 3833.3, when the document is otherwise filed on time, shall not be deemed conclusively to constitute an abandonment of the claim or site, but such information shall be filed within 30 days of receipt of a notice from the authorized officer calling for such information.

As is readily apparent from even a passing perusal of the language of this regulation, while it applies so as to make the unintentional failure to file the complete information required by 43 C.F.R. § 3833.1-7(d) essentially curable, this regulation does not apply to deficiencies arising from a failure to comply with 43 C.F.R. § 3833.1-7(b). This is not some mere unintentional oversight. Rather, the exclusion of 43 C.F.R. § 3833.1-7(b) from correction under 43 C.F.R. § 3833.4(b) is part and parcel of an intentional bifurcation imposed by the regulations.

The immediately preceding regulation, 43 C.F.R. § 3833.4(a)(2), provides, in relevant part, that the "failure to * * * file the documents required by 3833.1-7(a), (b), or (c) within the time periods prescribed therein, shall be deemed conclusively to constitute an abandonment of the mining claim, mill site, or tunnel site, which shall be void." Under the express language of this regulation, failure to file certifications for both the 1993 and 1994 assessment years on or before August 31, 1993, is a fatal, noncurable defect, notwithstanding the Satrom ipse dixit.

The regulatory history surrounding the adoption of these provisions clearly establishes that the drafters of the regulation intended to treat informational deficiencies under 43 C.F.R. § 3833.1-7(d) different from a failure to file a certification for each year as required by 43 C.F.R. § 3833.1-7(b). The language of Proposed Rule 43 C.F.R. § 3833.4(a)(2) had no provisions relating to failure to file the documents required by

43 C.F.R. § 3833.1-7(b) (see 58 Fed. Reg. 12887 (Mar. 5, 1993)), while the language of 43 C.F.R. § 3833.4(b), as originally proposed, read as follows:

The failure to file the information required in §§ 3833.1-2(b), 3833.1-7, 3833.2-5(c), and 3833.3 shall not be deemed conclusively to constitute an abandonment of the claim or site, but such information shall be filed within 30 days of receipt of a notice from the authorized officer calling for such information.

Proposed Rule § 3833.4(b), 58 Fed. Reg. 12887 (Mar. 5, 1993). Thus, as proposed, this rule would have encompassed all of the provisions of § 3833.1-7. In modifying this rule so that it covered only the provisions of § 3833.1-7(d) and (e), the Department first noted that "[p]aragraph (a)(2) was amended to make it clear that failure to file the certification as specified is * * * an abandonment." 58 Fed. Reg. 38194 (July 15, 1993). The Department then discussed the scope of the amended version of 43 C.F.R. § 3833.4(b):

One comment stated that paragraph (b) amounted to an abandonment of interest by BLM in verifying that the small miner exemption is justified. This paragraph merely provides for a 30-day period for a claimant to complete a timely but unintentionally insufficient filing. Such a failure to provide complete information for the certification filing for the small miner exemption within this 30-day period will reinstate the claimant's obligation to pay the rental fees.

58 Fed. Reg. 38194 (July 15, 1993).

The unmistakable import of both the regulatory language and the history behind the adoption of that language is that the drafters not only intended but did, in fact, provide for differing treatment of informational deficiencies on certifications which had been filed and the failure to file on or before August 31, 1993, certification for each year for which an exemption was sought.

The panel in Satrom, after quoting the language of 43 C.F.R. § 3833.4(b), justified its result as follows:

Although claimants filed the exemption document on time, they unintentionally failed to file the complete information required in 43 CFR 3833.1-7(d). Specifically, they failed to specify the assessment year or years that the exemption request was intended to cover. Under 43 CFR 3833.4(b), BLM should have provided claimants notice calling for such information and allowed 30 days for compliance.

138 IBLA at 181 (footnote omitted). In essence, the Satrom decision attempted to treat the failure of the certification document to specify

any year as a mere information deficiency. In reality, this failure rendered the document totally void.

The first line in the Certification of Exemption from Payment of Rental Fee form (Form 3830-1) submitted to BLM both in Satrom and in the instant appeal provides: "This small miners exemption is filed for the assessment year beginning at noon on September 1, 199__, and ending at noon on September 1, 199__." In the middle of the form, there appears two boxes, one of which must be checked, to establish whether or not the exemption is based on production or exploration. For those who check the production box, there follows another larger box in which the claimant has to list the commodities and gross dollar value produced. 2/ The statement above the production box provides an attestation that "I/We have produced from the mining claims/sites listed below more than \$1,500 and less than \$800,000 in gross revenues of a mineral commodity(ies) during the above assessment year that are subject to the General Mining Law of 1872, as amended; the Act of October 5, 1992; and the regulations at 43 CFR 3833.1-6 and 3850." (Emphasis supplied.) At the end of the form, immediately above the signature box provided for the claimant or claimants to certify their statements, the form provides that "[t]his exemption is filed by the above listed owner(s) in the State of _____ for this assessment year." (Emphasis supplied.)

The failure of a claimant to specify any assessment year on the form makes his or her attestation worthless since there is no period of time to which it can attach. Such a form is akin to a deed of sale which fails to describe the property being conveyed. Such a deed conveys nothing. The failure to list any assessment year is not an informational defect in a certification. Rather, it is, in reality, a noncertification. 3/ The failure to list any assessment year renders the document submitted a nullity and one not in compliance with 43 C.F.R. § 3833.1-7(b)(1) or (2). Under 43 C.F.R. § 3833.4(a)(2), the claim is conclusively deemed abandoned and void.

The foregoing should be contrasted with the situation in which both years are included on a single certification. In that situation, while

2/ In the Satrom case, Satrom had filled in the box appearing under the production attestation.

3/ Contrary to the majority's assertion (see supra at 133), I do not agree that Firestone filed any certification. While it is true that she submitted a document entitled "Certification of Exemption from Payment of Rental Fee," her failure to enter the years to which the certification applied rendered this a nullity. It is no more a certification of qualifications than it would be had she failed to sign the form and attest to the statements provided. The majority confuses the submission of a form with the completion of the legal process of certifying qualifications for exemption.

the submission is in technical violation of the requirement of 43 C.F.R. § 3833.1-7(d) that separate statements be filed, the document, itself, does constitute a certification of compliance with the small miner exemption for each of the years for which an exemption is being sought. Thus, this document complies with 43 C.F.R. § 3833.1-7(b)(1) and (2) and its failure to comply with 43 C.F.R. § 3833.1-7(d) may be waived under 43 C.F.R. § 3833.4(b).

The majority's failure to make this critical distinction results in the fashioning of a rule whereby those who file a certification for a single year (in other words, inadvertently omitting 1 year from their certification) find their claims invalidated while those who fail to list both years have this treated as a curable defect. Moreover, the majority's analysis effectively eviscerates 43 C.F.R. § 3833.4(a)(2), at least as it relates to 43 C.F.R. § 3833.1-7(b). It is bad enough that the majority has decided to rewrite the regulation to justify a desired result. What is truly objectionable is that it should draft such a bizarre regulation.

The majority seemingly recognizes that it has fashioned an exception which could devour the entire rule. Indeed, herein, appellant in addition to failing to identify any year to which her certification applied also sought to add additional claims to the document she subsequently filed. This is apparently too much for the majority to countenance, for it disallows this amendment on the ground that the identity of the claim, "being at the heart of the certification process," is not such an omission as may be cured. The majority cites no specific source for this "heart of the certification process" rule, which is scarcely surprising because it has just been created. The absence of any source, however, allows this rule to be extremely malleable since what is or is not "at the heart of the certification process" is dependent solely upon what the majority decides.

Thus, the majority does not deign to explain why the identity of the claim is deemed "at the heart of the certification process" while the year to which the certification applies is not. It is enough that the majority deems it so. Whether or not the signature of the claimant is "at the heart of the certification process" must await further clarification by the majority. 4/

Finally, in its attempt to rationalize its holding that the failure to identify any year on the certification form is a curable defect with prior Board precedents holding that the submission of a certification

4/ Actually, as explained below, the majority's "facially complete" rule would effectively prevent the addition of signatures "inadvertently" excluded from a certification signed by a single or multiple claimants. The question remains, however, whether a certification which contained no signatures would be subject to curative action.

form which identified only a single year was a noncurable defect even if the filer had intended to seek a waiver for both years (see, e.g., Lookout Mountain Mining & Milling Co., 140 IBLA 17 (1997); John C. Schandelmeier, 138 IBLA 36 (1997)), the majority fashions a rule which not only has no basis in the regulations but actually limits the applicability of 43 C.F.R. § 3833.4(b) far beyond what was intended by those who crafted the regulation.

The majority decision states:

There is no dispute that filing a certification listing a single assessment year is not a "curable defect." The regulation establishing the opportunity to cure certain defects in filing, 43 C.F.R. § 3833.4(b) covers "[u]nintentional failure to file the complete information required in" 43 C.F.R. § 3833.1-7(d) (among other provisions requiring the filing of information concerning mining claims). Filing of a certification form with the space provided on the form for "assessment year" filled in with "1993" is not a situation where a party has failed to file complete information, but one where assertedly incorrect information was filed. The circumstances described by filing a certification form specifying only one year are plausible and clear from the face of the document: the filer is seeking an exemption only for the one assessment year specified. If that entry is incorrect, the filer must accept the consequences of that mistake.

Supra at 131-32. As the majority subsequently asserts, "Listing of one assessment year results in a facially complete form which * * * binds the filer." Supra at 133. The foregoing analysis is remarkable for a number of discrete reasons.

First of all, it is unclear why the failure to include two years constitutes a failure to file complete information while the inclusion of one year, when two years were intended, is somehow transformed into the filing of "incorrect" information. So long as the year entered is, in fact, one of the years for which the exemption was sought, it is difficult to see how this is adjudged "incorrect," as opposed to incomplete, information.

More fundamentally, in its attempt to reconcile a demonstrably erroneous precedent (Satrom) with numerous other decisions of the Board, the majority decides to limit the applicability of 43 C.F.R. § 3833.4(b) to only those forms which are not "facially complete." In other words, as construed by the majority, only omissions are curable; mistakes are not subject to correction. Under the majority's "facially complete" rule, if a claimant fails to submit the serial number assigned by the land management agency to a plan of operations, as required by 43 C.F.R. § 3833.1-7(d)(1),

the claimant may cure this defect later. If, however, the claimant provides the wrong serial number, his filing is, under the "facially complete" rule, not subject to correction. 5/

This interpretation is not only clearly more restrictive than required, it is directly contrary to the intent of the regulation as stated in the preamble to the Final Rules. Thus, the Department noted, that "[i]f a small miner certification filing is submitted by the August 31, 1993, deadline, and errors are found in the submission, the authorized officer will allow a grace period of 30 days after receipt of notification." 58 Fed. Reg. 38194 (July 15, 1993) (emphasis supplied). Notwithstanding this clear statement of intent, the majority declares that errors cannot be cured. In its eagerness to justify one derelict precedent (Satrom) which would benefit a small handful of filers, the majority has crafted a rule which, if fairly followed, will greatly limit the efficacy of the entire curative regulatory provision to the detriment of vastly more claimants. 6/

Because I strenuously object to the result-oriented approach to regulatory interpretation as well as the conclusions espoused by the majority, I must dissent.

James L. Burski
Administrative Judge

5/ The fact that inclusion of the serial number of the plan of operations would not generally be seen as "at the heart of the certification process" is irrelevant under the majority's analysis. It is clear that the "facially complete" rule applies independently of this standard since the majority uses the "facially complete" rule to justify rejection of filings where only one year was included and the inclusion of the year had already been deemed not to be at the heart of the certification process in the majority's earlier analysis.

6/ Indeed, while the specific holding in this case will be beneficial to a small number of individuals (those who failed to list either year in the certification for exemption from rental fees), the "facially complete" rule will have a widespread adverse effect on numerous claimants since the rule necessarily limits the present availability of curative relief for failures to comply with the informational submissions necessary to obtain exemptions from maintenance fees to those situations in which the filers have failed to provide the information. Only omissions may be cured. Errors are now fatal.